

South Carolina Commission on Indigent Defense

Practice Standards for Parents' Attorneys
in Abuse and Neglect Cases

The following Practice Standards for Parents' Attorneys were formally adopted by the SC Commission on Indigent Defense on March 1, 2019, effective upon approval. Counsel in abuse and neglect cases should also refer to the General Performance Standards for Public Defenders and Assigned Counsel as adopted by the Commission on June 7, 2013, effective July 1, 2013.

These practice standards are not intended to provide a new basis for a claim of ineffective assistance of counsel. They are benchmarks taken from existing national standards, and do not and cannot redefine the existing precedents that set forth the basis for determining when reversible error has occurred.

Section 1. Purpose of Standards

In abuse and neglect proceedings in South Carolina Family Court, a parent's fundamental liberty interest in the care and custody of his or her child(ren) is at stake. The State, through its exercise of *parens patriae*, charges parents with being inadequate in the rearing of children and threatens a deprivation of both liberty and property. These standards aim to provide guidance to counsel in abuse and neglect proceedings with particular emphasis on the distinctive requirements of the South Carolina Child Welfare System.

Section 2. Attorney Role and Responsibilities

Guideline 2.1 Function of Defense Counsel. The participation of counsel for parents subject to abuse and neglect proceedings in Family Court is essential to the protection of one of the most precious fundamental rights, the right to family integrity and preservation of the family unit.

Guideline 2.2 Role of Counsel. Counsel's role is to ensure that the interests and rights of the client are fully protected and to ensure that the client is afforded due process. Counsel should be able to use procedural, evidentiary, and confidentiality rules and laws to protect the client's rights through court proceedings. Counsel in abuse and neglect proceedings should investigate the client's social, educational, and medical/psychological history, as well as procedural or criminal history. When appropriate, counsel should vigorously advocate for a plan or other appropriate outcome approved by the client. However, the attorney's job extends beyond the

courtroom. The attorney should be a counselor at law, as well as a litigator, and be available to provide advice and information about ongoing concerns with the case.

Guideline 2.3 Attorney Qualifications.

a. *State Statutes and Court Rules.* In order to provide competent representation, Counsel should know the South Carolina Code of Laws, the South Carolina Rules of Evidence, the South Carolina Rules of Family Court, the South Carolina Rules of Civil Procedure, the Interstate Compact on Placement of Children (ICPC), and state laws regarding domestic violence, and be prepared to research them when they are applicable.

b. *State Regulations.* Counsel should be familiar with Chapter 114 of the South Carolina Code of Regulations.

c. *Federal and State Constitutions.* Both federal and state constitutions protect parents' rights to the care, custody, and control of their children. Counsel should be familiar with the federal and state appellate decisions explaining parents' substantive and procedural rights and be prepared to research them when they are applicable.

d. *Federal Statutes.* Counsel should be familiar with Titles IV-B and IV-E of the Social Security Act, the Adoptions and Safe Families Act (ASFA), the Child Abuse and Prevention Treatment Act (CAPTA), the Indian Child Welfare Act (ICWA), the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), Fostering Connections to Success and Increasing Adoptions Act of 2008, the Americans with Disabilities Act, the Preventing Sex Trafficking and Strengthening Families Act of 2014, and be prepared to research them when they are applicable.

e. *Departments.* Counsel should be cognizant of the roles of the Department of Social Services (DSS), the Department of Disabilities and Special Needs (DDSN), the Department of Juvenile Justice (DJJ), and the Department of Mental Health (DMH). Counsel should be aware of the various service delivery systems and placement processes for these agencies.

Guideline 2.4 Attorney Training. Counsel must participate in all required training and mentoring before accepting appointment and should actively participate in ongoing training opportunities. Counsel should be encouraged to attend continuing legal education seminars devoted specifically to the function and procedures of representing clients involved in abuse and neglect proceedings.

Guideline 2.5 Acting Diligently and Promptly. Counsel is bound by Rule 1.3 of the Rules of Professional Conduct to act with reasonable diligence and promptness in representing the client. Counsel should be prompt in dealing with the court, including attendance, submissions of motions, briefs, and proposed orders, and in dealing with clients.

Guideline 2.6 Acting Ethically. Counsel must know and follow the standards of professional conduct set forth in the Rules of Professional Conduct and decisions of the South Carolina Supreme Court.

Guideline 2.7 Communication with Other Professionals in the Case. Counsel should make diligent efforts to engage in professional and courteous communications with attorneys for the other parties, court appointed special advocates (CASAs) or guardians *ad litem* (GALs), caseworkers, foster parents, and service providers to learn about the client's progress and their views of the case and to advocate for the client's position, as appropriate per the Rules of Professional Conduct.

Guideline 2.8 Independence of Counsel. It is essential that the professional independence of counsel and the integrity of the attorney-client relationship be maintained at all times.

Section 3. Attorney-Client Relationship

Guideline 3.1 Advocacy.

a. *Client's Goals.* Counsel should understand the client's goals and pursue them vigorously. The attorney should empower the client to set the goals of representation, participate in the defense of his/her case, and make informed decisions based on thorough counsel and providing comprehensive guidance on the advantages and disadvantages of different options. Counsel should explain all legal issues and expectations of the court and the agency, and the potential consequences of the client failing to meet those expectations.

b. *Burden of Proof.* The burden of proof is on the child welfare agency and the attorney should hold the agency to its burden. In practice, good advocacy also includes the client and the attorney demonstrating that the client can care for his/her child(ren). Counsel must consider all obstacles to this goal, such as safety concerns, criminal charges against the client, immigration issues, substance abuse or mental health issues, confidentiality concerns, permanency timelines, and the child (ren)'s and family's individual needs.

c. *Client's Authority.* Counsel must explain to the client what decision-making authority remains with the client and what lies with the child welfare agency. Unless and until parental rights are terminated, the client has obligations and rights while the client's child(ren) is in foster care and advocacy may be necessary to ensure the client is allowed to remain involved in key aspects of the child(ren)'s life or lives. The attorney must counsel the client and help the client understand his or her rights and responsibilities.

Guideline 3.2 *Duty of Loyalty.* Counsel should show respect and professionalism toward their clients and support their clients. Counsel should be sensitive to the client's individual needs. Additionally, counsel should remember that he or she may be the client's only advocate in the system and should take care to distinguish himself or herself from the others in the child welfare system. Counsel should be mindful that clients often feel disempowered in child welfare proceedings and should take steps to make the client feel comfortable expressing goals and wishes without fear of judgment.

Guideline 3.3 *Confidentiality.* Counsel should seek to establish a relationship of trust and confidence with the client. The lawyer should explain to the client that full disclosure of all facts known to the client is necessary for effective representation and, at the same time, explain that the lawyer's obligation of confidentiality makes the client's disclosures to counsel privileged. Additionally, the attorney must fully explain the advantages and disadvantages of choosing to exercise, partially waive, or waive a privilege or a right to confidentiality.

Guideline 3.4 *Communication with Client.* Counsel should clearly explain the allegations made against the client, what is likely to happen before, during, and after each hearing, and what steps the client can take to increase the likelihood of reuniting with the child(ren).

a. *Attorney-Client Contact.* Counsel should establish a reliable communication system that meets the client's needs. It is important that the attorney, from the beginning, is clear with the client that the attorney works as a team with the client, is available for consultation, and wants to communicate regularly. The attorney and client should develop timelines that reflect projected deadlines and important dates. The attorney and the client should know when important dates will occur and should be focused on accomplishing objectives in the case plan in a timely way.

b. *Documentation.* Counsel should provide all written documents to the client or ensure that they are provided in a timely manner and should be available to discuss and explain the documents to the client. If the client has difficulty reading, the attorney

should read and explain the documents to the client. Additionally, the attorney should ensure that the Department of Social Services translates all written documents into the client's native language.

Additionally, the attorney must be aware of any allegations of domestic violence in the case and not share confidential information about an alleged or potential victim's location.

Guideline 3.5 *Decision Making*. Certain decisions related to the conduct of the case are to be made by counsel and others by the client.

a. *Client Decisions.* The client is ordinarily responsible, after being fully advised and consulting with counsel, for determining the objectives of representation, and whether to settle a matter or appeal an adverse ruling.

b. *Attorney Decisions.* Decisions concerning what witnesses to call, whether and how to conduct cross-examination, what motion should be made, and similar tactical decisions are the exclusive province of the attorney after full consultation with the client. Counsel should provide expertise and make strategic decisions about the best way to achieve the client's goals.

Guideline 3.6 *Conflicting Interests*. Attorneys should avoid representing multiple parties in an abuse or neglect case. Even in cases in which there is no apparent conflict of interest at the beginning, conflicts may arise as the case proceeds. Attorneys should avoid representing multiple fathers in the same case or representing parties in a separate case who have interests in the current case.

Guideline 3.7 *Cultural Sensitivity*. Counsel should understand how racial, cultural, social, and economic differences may impact the attorney/client relationship and take these factors into account when working with clients to achieve their case goals, including identifying and accessing appropriate services. Counsel must be vigilant against imposing his or her values onto clients and should work within the context of the client's cultural and socioeconomic position. Counsel should understand and recognize the impact of personal and system bias stemming from race, gender identity, sexual orientation, ethnicity, culture, country-of-origin, disability, and socioeconomic status, and develop strategies, including legal strategies, to mitigate the negative impact of personal and system bias on clients' case goals. Counsel should strive to identify and use to clients' advantage their individual, familial, cultural, and community strengths.

a. *Trauma Informed.* Counsel should be aware that the client may have or probably did experience trauma and counsel must work to not re-traumatize or trigger

the client. Counsel should understand the latest research on the trauma that removal from family causes children and, with the client's permission, should advocate for the child(ren) to be placed with kin and to minimize the time that the child(ren) and the client are separated.

b. Language Barriers. Counsel should ensure a formal interpreter is involved when the attorney and client are not fluent in the same language. Counsel should advocate for the use of an interpreter when other professionals in the case, who are not fluent in the same language as the client, are interviewing the client. Counsel should advocate for the use of an interpreter when the client is appearing in court.

c. Participation Issues. Counsel should identify barriers to the client engaging in services, such as employment, transportation, and financial issues. Counsel should be aware of any special issues clients may have related to participating in the proposed case plan, such as an inability to read or language differences, and advocate with the child welfare agency and court for appropriate accommodations. Counsel should also be focused on whether services recommended by the agency are directly related to the issues that brought the child(ren) into foster care. Counsel should advocate against services that are extra or unnecessary for the child(ren) to be able to safely return to the client.

d. Incarceration. Counsel should be aware of the unique issues an incarcerated or detained parent faces and should provide competent advice. Counsel must be aware of the reasons for the incarceration and should be prepared to argue against a motion to terminate reasonable efforts toward reunification. The attorney should counsel the client as to any effects incarceration has on the agency's obligations and know the jurisdiction's statutory and case law concerning incarceration as a basis for TPR. Additionally, counsel may need to advocate for reasonable efforts to be made for the client and assist the client and the agency caseworker in accessing services.

e. Mental Health and other disabilities. Counsel must be able to determine whether any mental health condition or other disability interferes with the client's ability to make decisions about the case. While the attorney is not expected to be a mental health or disability expert, the attorney should be familiar with any mental health diagnosis and treatment that a client has had in the past or has presently, including any medications for such conditions, and any identified disabilities and the impact of or treatment for such disabilities. Counsel should get consent from the client to review mental health and other records and speak with former and current healthcare providers. Counsel should also be cognizant of how any mental health

condition or other disability may affect reunification efforts or other interactions with the agency or other parties and be prepared to advocate as appropriate in each case.

Section 4. Investigation

Guideline 4.1 *Thorough and Independent Investigation*. Counsel cannot rely solely on what the agency caseworker reports about the client. The attorney should contact service providers who work with the client, relatives who can discuss the client's care of the child(ren), the child(ren)'s teacher, or any other person who can clarify information relevant to the case. Counsel is responsible for gathering all pertinent case information.

Guideline 4.2 *Interview the Client Regularly*. Counsel should communicate regularly with the client to obtain information about the case. These communications should occur well before the hearing, not at the courthouse just minutes before the case is called before the judge. These discussions may involve disclosure of sensitive or painful information and the attorney should explain attorney-client confidentiality to the client.

Section 5. Informal Discovery

Guideline 5.1 *Review Agency File*. Counsel should ask for and review the agency case file as early during the course of representation as possible and periodically throughout the representation. It is important that counsel understands what information the agency is relying on to further its case. Further, the file may contain important reports and information about both the child and the client that will be necessary for counsel to understand for hearings as well as settlement conferences.

Guideline 5.2 *Relevant Documents*. Counsel should obtain all necessary documents, including copies of all pleadings and relevant notices filed by the other parties, and information from the caseworker and providers. Discovery is not limited to information regarding the client but may include records of others, such as the other parent, the child, stepparents, relatives, and non-relative caregivers. Additionally, the attorney should review social service records, court records, medical records, school records, and evaluations of all types.

Section 6. Formal Discovery

Guideline 6.1 *Formal Discovery*. Counsel should become familiar with the pretrial requests and actions used in the jurisdiction and use whatever tools are available to obtain necessary information. The attorney should consider the following types of formal discovery: depositions, interrogatories, requests for production, requests for admission, and motions for mental or physical examination of a party. Additionally, the

attorney should, consistent with the client's interests and goals, and where appropriate, take all necessary steps to preserve and protect the client's rights by opposing discovery requests of other parties.

Section 7. Court Preparation

Guideline 7.1 Case Theory/Strategy. Counsel should develop a strategy for representation. The strategy may change throughout the case, but the initial theory is important to assist the attorney in staying focused on the client's wishes and on what is achievable.

Guideline 7.2 Filing and Research.

a. *Filing.* Counsel must file petitions, motions, discovery requests, and responses and answers to pleadings filed by other parties that are appropriate for the case. These pleadings must be thorough, accurate, and timely. Additionally, counsel should proactively seek court orders on behalf of the client.

b. *Research.* Counsel should conduct the appropriate research before appearing in court. Counsel must have a solid understanding of the law and be able to present it to a judge in a compelling and convincing way.

c. *Advance Legal Arguments.* Counsel should ground his or her argument in constitutional, statutory, regulatory, and common law. At times, competent representation requires advancing legal arguments that are not yet accepted in the jurisdiction. Counsel should be mindful to preserve issues for appellate review by making a record, even if the argument is unlikely to prevail.

Guideline 7.3 Case Planning and Social Services.

a. *Case Planning.* Counsel should actively engage in case planning, including attending major case meetings, to ensure the client asks for and receives the services needed. The attorney should consider whether the child's representative might be an ally on service and visitation issues. When necessary, counsel should seek court orders to force the child welfare agency to provide appropriate or necessary services or visitation to the client.

b. *Services.* Counsel should know about the social, mental health, substance abuse treatment, and other services that are available to clients and families in the jurisdiction in which the attorney practices. The attorney should be available to accompany the client to important meetings with service providers as needed. The attorney should counsel the client about the importance of participating in appropriate

services and advocate against services that are not specific to the needs of the individual family.

Guideline 7.4 Visitation. Although visitation is presumed to be unsupervised, counsel should still advocate for as much unsupervised contact between the client and child(ren) as reasonably possible or at the lowest possible level of supervision. Counsel should aggressively advocate for regular visitation in a family-friendly setting, such as in the family home, parks, libraries, restaurants, places of worship, or other community venues. Counsel should also advocate for frequent phone or video contact between the client and the child(ren) (for example, before bed each night) and for the client to be permitted to attend the child(ren)'s activities, such as watching the child(ren)'s school play or sports games. Preservation of the parent-child bond through regular visitation is essential to any reunification effort. Courts and child welfare agencies may need to be pushed to develop visiting plans that best fit the needs of the individual family.

Guideline 7.5 Settlement and Mediation. Counsel, with the client's permission, and when appropriate, should engage in settlement negotiations and mediation to resolve the case, keeping in mind the effect of continuances and delays on the client's goals. Attorneys should be trained in mediation and negotiation skills and be comfortable resolving cases outside of a courtroom setting when consistent with the client's position. Counsel should, when authorized to do so by the client, share information about services in which the client is engaged and provide copies of favorable reports from service providers. Additionally, the attorney must communicate all settlement offers to the client and discuss the advantages and disadvantages of same.

Guideline 7.6 Client Testimony. Counsel should thoroughly prepare the client to testify at the hearing. Counsel should discuss and practice the questions that the attorney will ask the client, as well as the types of questions the client should expect opposing counsel to ask. Counsel should help the client find the best way to present information, familiarize the client with the court setting, and offer guidance on logistical issues such as how to get to court on time, and appropriate court attire

Guideline 7.7 Witnesses. Counsel, in consultation with the client, should identify, locate, and prepare all witnesses well before a hearing. Counsel should set aside time to fully prepare all witnesses in person and remind the witnesses about the court date. Counsel should not assume that the agency will call a witness, even if the witness is named on the agency's witness list.

Guideline 7.8 Expert Witnesses. Counsel should identify, secure, prepare, and qualify expert witnesses when needed. When opposing parties plan to call expert witnesses,

counsel should file expert interrogatories, depose the witnesses, or interview the witnesses in advance, depending on the jurisdiction's rules on attorney work product. Counsel should do whatever is necessary to learn what the opposing expert witnesses will say about the client during the hearing.

Section 8. Hearings

Guideline 8.1 *Attendance and Preparation*. The attorney must prepare for and attend all hearings, including telephone and pre-trial conferences with the court.

Guideline 8.2 *Continuances*. Counsel should avoid continuances and work to reduce delays in court proceedings unless there is a strategic benefit for the client. If a continuance is necessary, counsel should request the continuance in writing, as far as possible in advance of the hearing, and should request the shortest delay possible, consistent with the client's interests.

Guideline 8.3 *Motions and Objections*. Counsel should make appropriate motions and evidentiary objections to advance the client's position during the hearing. Counsel must understand the applicable rules of evidence and all court rules and procedures. If necessary, counsel should prepare and file briefs in support of the client's position on motions and evidentiary issues.

Guideline 8.4 *Trial Advocacy*. Counsel must learn the rules about presenting witnesses, impeaching testimony, and entering evidence. Counsel must be able to present witnesses effectively to advance the client's position. Counsel must be skilled at cross-examining opposing parties' witnesses and must know how to offer documents, photographs, and physical objects into evidence. Additionally, counsel should actively seek out training in trial skills and observe more experienced trial attorneys to learn from them.

Guideline 8.5 *Cleared Courtroom*. Counsel should be aware of who is in the courtroom during a hearing and should request the courtroom be cleared of individuals not related to the case when appropriate. In many courts, even if they have a "closed court" policy, attorneys, caseworkers, and witnesses on other cases listed that day may be waiting in the courtroom. These individuals may make the client uncomfortable, and counsel should request the judge remove them from the courtroom.

Guideline 8.6 *Opening and Closing Remarks*. When permitted by the judge, counsel should make opening and closing remarks to best present the theory of the case.

Guideline 8.7 Proposed Findings. Counsel should prepare proposed findings of fact, conclusions of law, and orders. By preparing proposed findings of fact, conclusions of law, and orders, counsel frames the case and potentially the ruling of the judge. Preparing proposed findings of fact, conclusions of law, and orders helps counsel clarify desired outcomes before a hearing begins, may help counsel preserve appellate issues, and may result in orders that are more favorable to the client.

Section 9. Post Hearing/Appeals

Guideline 9.1 Review Court Orders. Counsel should review the written order to ensure it reflects the court's verbal order. Counsel should review the order with the client and should take reasonable steps to insure the client complies with court orders and determine whether the case needs to be brought back to court.

Guideline 9.2 Appeal.

a. *Discussion with Client.* Counsel should consider and discuss the possibility of appeal with the client when a court's ruling is contrary to the client's position or interest. The attorney should counsel the client on the likelihood of success on appeal and potential consequences of an appeal.

b. *Appeal.* Counsel should carefully review his or her obligations under the South Carolina Rules of Appellate Practice. Counsel should timely file all paperwork, including notice of appeal and requests for stays of the trial court order, transcript, and case file. The appellate brief should be clear, concise, and comprehensive. The brief should reflect all relevant case law and should present the best legal arguments available in state and federal law for the client's position.

c. *Expedited Appeal.* If the state court allows, counsel should request an expedited appeal and file all necessary paperwork while the appeal is pending. In this request, counsel should provide information about why the case should be expedited, such as any special characteristics about the child(ren) and why delay would harm the relationship between the client and the child(ren).

Guideline 9.3 Results. Counsel should communicate the result of the appeal and its implications and provide the client with a copy of the appellate decisions. If, as a result of the appeal, counsel needs to file any motions with the trial court, the attorney should do so.